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Court of Appeals
Division II
State of Washington
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LORI MACKEY,
Appellant

v.

HOME DEPOT USA, INC. dba THE HOME DEPOT STORE #4718,
JAMIE KRALL, and JENNIFER ILES,
Respondents.

APPELLANT'S REPLY

Moloy K. Good, WSBA No. 36036
THE GOOD LAW CLINIC, PLLC
7017 NE Highway 99, Suite 106
Vancouver, WA 98665
360-694-4530
Counsel for Appellant

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I

ARGUMENT

The Respondents' attempt to shift the focus and provide the court with alternate facts only supports Appellant's argument that material issues of fact exist, which required the denial of Defendant's motion for summary judgment. Respondents additionally attempt to portray Appellant as engaging in some sort of scheme where she was attempting to defraud Respondent Home Depot. Respondents' Brief, pg. 9. However, it is critical to recognize that Respondents produced no evidence that Appellant engaged in any sort of scheme, or that Appellant benefited personally from her service to Respondent's customers. Respondents have repeatedly asserted that Appellant was fired because of her alleged violations of its policies rather than being terminated as a result of her disabilities and request for a reasonable accommodation.

A. DISCRIMINATORY DISCHARGE

Despite Respondents' assertions to the contrary, Appellant did establish a prima facie case of discriminatory discharge. As discussed in Appellant's opening brief, prior to Appellant's complaint about Respondent Krall's treatment of Appellant, Appellant was not disciplined for her employment and Appellant complied with Defendant's reduction policies for its customers. While Appellant does not dispute that there

might have been accidental discounts provided to customers, Appellant alerted her supervisor when an accidental discount was provided and was told that it was not a problem but to change her practice in the future. Appellant's Brief pg. 14.

Respondents fail to acknowledge that Appellant produced evidence that the Respondent Home Depot's investigation occurred immediately after Appellant complained about discriminatory treatment by Respondent Krall. It was after Appellant complained that Respondents suddenly found it imperative to investigate Appellant. Respondents allege that Appellant violated its policies for a period of time but it only engaged in an investigation into Appellant after she complained about discriminatory treatment.

Respondents assert that it had a good faith basis for terminating Appellant BUT it fails to acknowledge or even address the fact that it was aware of Appellant's "double dipping" prior to the investigation and not only did it not discipline Appellant, it's management told Appellant that it was not a big deal. Appellant's Brief pgs. 13-14. Respondent Home Depot's reliance on an investigation that resulted in information that it already knew to justify its termination of Appellant is insufficient, because it did not provide Respondents with any new information as to Appellant's employment and practices used during her employment. Respondent

relies upon an investigation that provided no new information to support its termination of Appellant after Appellant made a request to which she was entitled.

B. FAILURE TO ACCOMMODATE

Respondents, again, miss the point by asserting that it provided a reasonable accommodation for Appellant's physical disability. Respondents' accommodation to Appellant was to require her to ask other employees to help her perform the duties of her job. Respondents did not provide Appellant with any other accommodations to perform the essential functions of her job. As discussed in Appellant's opening brief, requiring Appellant to ask other employees to perform the duties of her job is not a reasonable accommodation. Appellant's Brief pgs. 31-33. Respondents' accommodation required Appellant to tell her co-workers that she had a disability as well as required her to ask her co-workers to perform her duties instead of their own. This is not a reasonable accommodation. *Kermini v. International Health Care Props. XXIII Ltd. Pshp.*, 1999 Wash. App. LEXIS 581, *11-13 (Wash. App. 1999).

Respondents cite cases holding that not taking advantage of a reasonable accommodation renders an individual not a qualified individual with a disability. But the facts of this case are not that Appellant did not take advantage of a reasonable accommodation that she was offered. Here

Appellant was never offered a legitimate reasonable accommodation: Appellant was not offered a “helper” to perform her duties; nor did Respondents reduce Appellant’s duties to meet her disability-related needs. Instead Respondents forced Appellant to alert her co-workers of her disability, and then ask her co-workers to perform her work duties rather than their own. Respondents allege that Appellant did not comply with the accommodations it offered, but this allegation presumes that requiring Appellant to find others to assist her is a reasonable accommodation. Respondents did not provide Appellant with a singular individual to perform the lifting requirements of her job that she was unable to perform. Respondents did not tell Appellant that if there was a lifting requirement she could not perform, she did not have to perform that duty. Additionally, Respondents’ assertion that Appellant failed to cooperate with Respondents’ offered accommodation likes on the faulty presumption that Respondents provided Appellant with an actual reasonable accommodation.

C. PRETEXT

Contrary to Respondents’ argument, Appellant did provide evidence of pretext. As Respondents state pretext can be shown by (amongst other things) demonstrating that the employer’s articulated non-discriminatory reason lacks basis in fact. Respondents’ Brief pg. 21-22.

Appellant has consistently argued precisely this point at every stage. The results of Respondents' investigation are not true or accurate.

Appellant provided evidence of how she was trained on applying volume bids, and how she did apply volume bids. Clerk's Papers, pg. 99 – 100. She provided evidence that when a mistake had occurred with a volume bid she informed Respondent Home Depot's operations manager. CP, pg. 100. She provided further evidence that when she had honored a volume discount, but was not sure if she should have, she approached Respondent Home Depot's store manager and disclosed the issue and received guidance from him on how to address the problem in the future. CP, pg. 101. Finally, she provided evidence that she sought approval from Respondent Krall when she had a question of whether to provide a volume bid. *Id.* Appellant also provided evidence that when she was accused of giving improper discounts she attempted to explain that her actions were consistent with Respondent Home Depot's policies and her training. CP, pgs. 102, 104 - 109.

Additionally, as argued above, she provided evidence that the investigation into her discounts was started shortly after she had complained to Respondent Home Depot's store manager about how Respondent Krall had mistreated Appellant and negatively affected her disabilities. CP, pg. 102.

These facts, in whole or in part, are sufficient to establish a material issue of fact as to whether Respondent Home Depot's articulated non-discriminatory reasons for termination are pretextual. Therefore, summary judgment was inappropriate.

D. GOOD FAITH BASIS

Respondent repeatedly argues that it had a good faith basis for terminating Appellant but ignores two key facts: first, that the investigation was commenced a very short time AFTER Appellant complained about how Respondent Krall had treated her, and that Respondent Krall's ill treatment had negatively impacted Appellant's disabilities. The circumstantial link between Appellant's complaint and the start of the investigation raises a reasonable inference that the investigation was not done in good faith. Second, that Appellant had told Respondent's management, prior to the investigation, when she accidentally violated the Respondent's policies, and Respondent's management assured her that it was not a big deal, but that in the future she should not do that. In essence, the investigation was into a problem that Appellant had already brought to Respondent Home Depot's attention, and received instruction on how to address it moving forward.

Respondents have produced no evidence that Appellant performed any of her job duties to benefit herself or to take money away from

Respondents. As shown through Appellant's years of employment with Respondent Home Depot, Appellant was a reliable and successful employee who was not subject to discipline. Respondent Home Depot relies on the "results" of investigations that provided the same information it knew prior to the investigation and did nothing about.

Respondents' reliance on the investigations is not in good faith. At a minimum questions of fact exist as to whether Defendant's reliance was actually in good faith.

E. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

In order to prevail on a wrongful discharge claim for "whistleblowing activity" a plaintiff must show that (1) there is a clear mandate of public policy, and (2) that plaintiff's public-policy linked conduct was a "significant factor" in the decision to discharge the plaintiff. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725, 425 P.3d 837 (2018).

Washington courts have held that sources of public policy can come from federal, state, or local legislation. *See, Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 234, 655 P.2d 1084 (1984); *Young v. Ferrellgas, L.P.*, 106 Wn.App. 524, 530, 21 P.3d 334 (Div. II, 2001); *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000); *Hubbard v. Spokane*, 146 Wn.2d 699, 50 P.3d 602 (2002). In this case Appellant has

claimed she was terminated for opposing an unfair practice as announced in RCW 49.60. CP, pg. 7. RCW 49.60 provides a clear mandate of public policy.

On the second element, as discussed above, Appellant has shown that there is, at a minimum, a dispute about material facts as to whether a significant factor in her termination was Appellant's public-policy linked activity. Courts recognize that there is seldom direct evidence that a termination was due to an employee's protected activity. Therefore, they look to circumstantial evidence to see if a causal link between the protected activity and the termination can be established. In *Wilmot v.*

Kaiser Aluminum & Chem Corp., the Court stated:

Discharge some length of time after the employee's filing of a claim will be less likely to reflect an improper motive connected with that claim. Thus . . . in establishing the prima facie case, "[p]roximity in time between the claim and the firing is a typical beginning point, coupled with evidence of satisfactory work performance and supervisory evaluations." (Footnotes omitted.) 1 L. Larson § 6.605[5], at 6-51.

118 Wn. 2d, 46, 69, 821 P.2d 18 (1991).

Here the sequence of events establishes a strong inference that Appellant's complaint led to her termination. Appellant was verbally attacked by Respondent Krall, an act that negatively affected Appellant's

disabilities. CP, pg. 102. The next day Appellant complained to

Respondent Home Depot's store manager about Respondent Krall's actions. *Id.* Within less than two weeks of this complaint Respondent Home Depot had started an investigation into Appellant, completed it, and terminated Appellant. *Id.* Furthermore, she had never received any reprimands or discipline for her acts or behavior. *Id.* In fact, she had performed well and received awards from Respondents. CP, pg. 103, 110 - 126. Under these facts Appellant has established sufficient evidence to create a presumption that her termination was related to her protected activity.

II

CONCLUSION

For the reasons articulated in Appellant's Opening Brief and in this Reply, this court must reverse the trial court's judgment and remand the matter for trial on the merits.

Dated: April 3, 2019

Respectfully submitted,

THE GOOD LAW CLINIC, PLLC

By: *s/Moloy K. Good*

Moloy K. Good

WSBA# 36036

Attorney for Plaintiff/Appellant

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NO. 52293-4-II

COURT OF APPEALS, DIVISION II
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LORI MACKEY

Appellant

v.

**HOME DEPOT USA, INC. dba THE
HOME DEPOT STORE #4718, JAMIE
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Respondants.

CERTIFICATE OF SERVICE
RE APPELLANT'S REPLY

CERTIFICATE OF SERVICE

I hereby certify that I served the APPELLANT'S REPLY on the below listed persons:

D. Michael Reilly
Lane Powell PC
PO Box 91302
Seattle, WA 98111-9402

By causing a full, true and correct copy thereof to be MAILED by regular mail in a sealed, postage-paid envelope, addressed as shown above, and deposited with the US Postal Service in Vancouver, WA on the date set forth below.

DATED this 3rd day of April, 2019.

s/Judy L. Fryer
JUDY L. FRYER - Paralegal

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